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No.....

Supreme Court of the United States

OCTOBER TERM, 1950.

CAPITOL COMPRESSED STEEL COMPANY, a corporation,
Petitioner,

VERSUS

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
a corporation,
Respondent.

No.....

CAPITOL COMPRESSED STEEL COMPANY, a corporation,
Petitioner,

VERSUS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Tenth Circuit entered in the consolidated above entitled cases on the 29th day of July, 1950.

OPINIONS BELOW

The trial court made certain findings of fact and conclusions of law (R. 11) and entered judgment for the respondents (R. 17), which opinion is not officially reported. The Court of Appeals for the Tenth Circuit affirmed the opinion of the trial court (R. 87), which opinion is reported in 183 Fed. (2d) 691 (Advance Sheet, October 2, 1950).

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1950 (R. 91). The jurisdiction of this Court is invoked under 28 U. S. C., 1254.

QUESTIONS PRESENTED

(1) The War Assets Administration sold and petitioner bought steel cable as scrap for the sole purpose of melting to recover the ferrous content. The applicable tariff provided for scrap rate though such material was in its original form, but required shipment to be described as scrap in bill of lading and a certificate by shipper and consignee that the material was bought as scrap and had no recognized value except for recovery of ferrous metal content. Through mistake, the War Assets Administration failed to describe the shipment as scrap or make such certificate, but petitioner, on arrival, changed the bill of lading

to show material as scrap and executed the certificate the tariff required. Later, the War Assets Administration executed such a certificate and confessed their oversight. Query: Where a tariff provides certain requirements in connection with securing a certain favorable rate, is it sufficient to substantially meet such requirements so as to satisfy the intent and purpose sought to be accomplished by them, or is a literal and absolute compliance necessary?

(2) Should the consignee of material which was purchased from the War Assets Administration be penalized and required to pay a higher tariff rate for the material purchased, due to the failure and refusal of the War Assets Administration to comply with the shipping directions given to it by the consignee?

STATUTE INVOLVED

The pertinent statutory provision involved is Section 6 (7) of the Interstate Commerce Act (49 USCA, 6 [7]), providing that no carrier shall charge or collect a less or different compensation for transportation of property than the charges specified in its tariff filed and in effect at the time of the shipment moving in interstate commerce. The pertinent tariff provisions involved are Item 6920 of the SWL Tariff No. 173-U (R. 27);[1] and Item 2620 SWL Tariff

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[1]This tariff provides for a rate of eighty-six cents (86c) per cwt. on wire rope.

No. 173-U (R. 31) and Freight Tariff 414-A, Item 40, commonly called Kipps Tariff (R. 33).[2]

STATEMENT OF THE CASE

There was no dispute upon the facts, which were all stipulated with the exception of a small amount of implementing testimony which was uncontradicted.

On December 6, 1946, the War Assets Administration at New Orleans, Louisiana, issued a special offering of certain surplus Government property consisting of wire rope (R. 73), which was heavy cable used for towing large ships and which the Administration had not been able to sell for its original purpose. The petitioner tendered a bid for the material on the basis of $22.20 per ton (R. 73),

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[2]Freight Tariff No. 414-A
Application
Iron and Steel Scrap.

Carload rates, ratings and minimum weights applicable on iron or steel scrap will also apply on carload shipments of pieces of iron or steel (not scrap or fragments) and iron or steel articles, in their original form or partly dismantled, with or without other metals incidentally combined therewith, having no recognized commercial use or value except for the recovery of the ferrous-metal content thereof, provided

(a) Each such shipment is described in the bill of lading as follows: "Scrap iron or steel, viz. _____ (Here insert general description of lading)."

(b) The shipper certifies on the bill of lading:
"The material comprised in this shipment has been bought as iron or steel scrap and has no recognized commercial use or value except for the recovery of the ferrous-metal content thereof _____ (Shipper) By _____."

(c) The consignee executes and furnishes to the delivering carrier a certificate in the following form:
"The undersigned consignee hereby certifies that the property described in the following freight bill: _____ Railroad Freight Bill No. _____ Date _____ Car No. and Initial _____ Commodity _____ Origin _____ Destination _____ Consignor _____ Consignee _____ has been bought by him (or us) as Iron or Steel Scrap; that it has no recognized commercial use or value except for the recovery of the ferrous-metal content thereof; and that it will be used or resold only for that purpose."

which was the current rate for scrap iron. The bid was accepted upon a scrap basis.

The petitioner wrote the War Assets Administration instructing it to bill the material as steel scrap and to ship it in open top gondola cars (R. 63).

On March 1, 1947, petitioner sent a telegram to the War Assets Administration requesting that the cars be billed as scrap for remelting purposes only (R. 64).

Under the provision of Kipps Tariff 414-A, Item 40 (R. 33), the War Assets Administration, the shipper, should have described the material as (a) scrap iron or steel consisting of wire rope and should have certified on the bill of lading (b) "the material comprised in this shipment has been bought as iron or steel scrap and has no recognized use or value except for the recovery of the ferrous metal content thereof."

Due to confusion in defining and interpreting Kipps Tariff 414-A, Item 40, origin point certificates were not executed by the War Assets Administration at the time the shipments took place; that the petitioner was rightfully entitled to have its instructions carried out and the bills of lading prepared to comply with (a) and (b) of Kipps Tariff (R. 40, 41, 42 and 43).

When the material arrived in Oklahoma City, the petitioner-consignee changed the bill of lading to show that the material was scrap, and executed a certificate which substantially complied with (c) of Kipps Tariff (R. 65).

There were 14 carloads of material involved in the transaction. The delivering carrier of 4 cars was the re-

spondent, St. Louis-San Francisco Railway Company, and the delivering carrier of 10 cars was the respondent, Chicago, Rock Island & Pacific Railroad Company.

The petitioner paid the respective respondents the scrap rate of 26¢ per cwt., as provided by Item 2620 SWL Tariff No. 173-U (R. 31), and the respective carriers instituted action claiming the proper tariff to be 86¢ per cwt., under Item 2620 of the SWL Tariff No. 173-U (R. 27).

If the respondents are entitled to have applied the rate claimed and allowed by the trial court, it would be forcing petitioner to pay freight charges equivalent to three-fourths of the entire purchase price of the material sold. Manifestly, if this were to be the case, petitioner could never have afforded to have purchased this material and the War Assets Administration could not have found a market for it.

The trial court entered judgment for the respective respondents for the amount sued for (R. 47), and the court below affirmed the order of the trial court (R. 91).

The respondent railroads instituted separate actions, but the facts and questions involved in both cases being identical, the trial court consolidated the two cases for the purpose of trial, and the Court of Appeals for the Tenth Circuit consolidated the two cases and rendered one opinion (R. 87).

REASONS FOR ALLOWANCE OF WRIT

The American public spends more money for transportation than for any other item except food. Manifestly, whether or not an absolute, literal compliance is necessary for a shipper to procure a more favorable rate afforded under a tariff or a substantial compliance meeting the objective sought to be accomplished by such requirements is of great importance. It is our position that this Court has decided this point and that the decisions of the courts below are in conflict therewith, but if we are incorrect in this regard, then this is a Federal question of importance that should be decided and set at rest by this Court.

The courts below have given a literal construction to the tariff provisions, required an absolute compliance, and have penalized petitioner for failure of the War Assets Administration to perform such prerequisites, although petitioner did all it could to secure such performance from the War Assets Administration and the Administration belatedly undertook to rectify its mistake to substantially comply.

In other words, the courts below have preferred form to substance, and have decided the matter in an unrealistic way with closed eyes to the actual facts, which were undisputed, that the shipments were sold by the War Assets Administration and purchased by the petitioner as scrap; that they had no other commercial value and the War Assets Administration had been unable to sell them for any other purpose; and the material shipped was actually cut up into segments and melted down to recover the ferrous content.

The opinion of the Circuit Court recognizes that "there was no market for this type of marine cable for its intended use", and that "the wire cable would have been entitled to move under the Kipps Tariff if the requirements of Subparagraphs a, b, and c thereof had been complied with."

But it is held that since the War Assets Administration did not describe the shipment as "steel scrap" in the bill of lading, and certify thereon that "the material comprising this shipment has been bought as iron or steel scrap and has no recognized commercial use or value except for the recovery of the ferrous metal content thereof", as required by Subparagraphs a and b, *at the time the shipment moved,* there was no compliance with the tariff provisions and petitioner was not entitled to the scrap rate.

No attenion is paid to the stipulated fact (R. 46) that the material shipped was actually used as scrap and melted down. Nor does the court give any significance to the fact that the official of the War Assets Administration, after the shipment moved, certified by affidavit that:

> "* * * the foregoing shipments constituted wire rope bought by the Capital Compressed Steel Company from the War Assets Administration for the sole purpose of recovery of the metal content of the wire rope and that the application of Kipps Tariff 414-A was to be applicable in connection with the transportation of the aforementioned material.
>
> "Affiant further states that the shipping instructions of the Capital Compressed Steel Company specified that the material was to be used for the recovery of the metal content of the foregoing shipments.

"Affiant further says that requests were made by the Compressed Steel Company to have certification as required by Kipps Tariff 414-A placed on bills of lading at origin point, but due to confusion in defining and interpreting the application of Kipps Tariff 414-A, origin point certificates were not executed at the time shipments took place although the shipping instructions of the buyer requested such certification."

Finally, the court closes its eyes to the fact that when the shipment was received in Oklahoma City, petitioner (R. 65) executed a certificate to the respondent railroads that the material "was purchased as scrap and will be prepared and sold as scrap for remelting purposes only."

Where the purpose of a statute is shown to have been served, there is a substantial and sufficient compliance with the statute. The great purpose of that portion of the Commerce Act relating to the tariffs is well stated by this Court in *New York, N. H. & H. R. Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, at 521, that:

"Whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination."

As to the construction of this statute, the Court said that it is "*entitled to receive that interpretation which reasonably* accomplishes the great purpose which it was enacted to subserve" (Emphasis ours).

One is irresistibly drawn to the conclusion that the foregoing facts establish sufficient compliance to accomplish this purpose of the Act. Certainly, to allow the appliance of the scrap rate here could in no wise amount to discrimination or favoritism, nor give rise to a practice resulting in the same. Furthermore, petitioner did all that it could, and it could not compel a Governmental agency to accede to its request, and particularly where petitioner did not learn of the violation of its request until the shipments had already arrived in Oklahoma City.

A tariff is not *sui generis*, and its construction presents questions similar to the construction of any other document, such as statutes and contracts—merely to be construed in the light of their general design and purpose. *Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285, 42 Sup. Ct. 477, 66 L. Ed. 943; *Boone* v. *United States* (6th Cir.), 109 Fed. (2d) 562.

Substantial compliance with statutes and contracts, that is, meeting such requirements as reasonably accomplish their purposes, is sufficient. 50 American Jurisprudence "Statutes", Section 19, N. 3-6; *Leroy Dyal Company* v. *Allen* (4th Cir.), 161 Fed. (2d) 152.

The courts are interested in compliance with the spirit rather than the letter of a statute. *Fleischmann Seed Company* v. *United States for use of Forsberg*, 270 U. S. 249, 46 Sup. Ct. 284, 70 L. Ed. 624; *Oates* v. *First National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Orme* v. *Lendahand* (CCA-DC), 128 Fed. (2d) 756; 50 American Jurisprudence "Statutes", Sections 301-2; 59 C. J., page 964.

This principle has been applied to tariffs published and filed pursuant to the Commerce Act, and in our opinion the courts below have decided this important question of Federal law contrary to the decision of this Court in *St. Louis S. W. Ry. Company* v. *Spring River Stone Company,* 35 Sup. Ct. 456, 236 U. S. 718, 59 L. Ed. 805.

Judge Hutcheson of the Fifth Circuit had occasion to apply said decision while sitting as District Judge in *St. Louis-San Francisco Railway Company* v. *Republic Box Company,* 12 Fed. (2d) 441, wherein, while taking notice of the purpose of the Commerce Act to effectuate uniformity of application of rates to shippers and to eliminate discrimination, he pointed out that courts in considering such tariffs should nevertheless interpret them:

> "* * * with an eye as much to the practical injustice of the particular case as to the sanctity of the general rule * * *."

And that:

> "* * * the business of shipping freight will not be as perilous to the shipper as it has been, and a rule against discrimination designed to protect shippers will not be, as it has been often in the past, a sword to destroy them."

Following this philosophy, he cites the above decision of this Court as supporting the application of the rules for which we herein contend, saying in the body of the opinion at page 442:

> "It is true that instances of individual hardship cannot change the policy which Congress has embodied in the statute, in order to insure uniformity in charges for transportation *(Pittsburg, etc., R. Co.* v.

Fink, 40 S. Ct. 27, 250 U. S. 582, 63 L. Ed. 1151), and neither estoppel nor agreement can change this rule (*Id.*). But it is also true that courts will not literally enforce rates where the individual circumstances of the particular case make it certain that the invocation of the principle is an absurdity; for, while it must be admitted that the theory of uniformity has made it very difficult to do justice in the individual case, the Supreme Court did, in *St. Louis S. W. Ry. Co.* v. *Spring River Stone Co.*, 35 S. Ct. 456, 236 U. S. 718, 59 L. Ed. 805, find itself able to apply reason in the application of the rule."

The harsh, rigid, absolute and literal compliance with the tariff provisions required by the courts below goes contrary to the above salutary principles which do no violence to the accomplishment of the purposes of the Commerce Act, and indeed turn such Act and the tariff provisions into a sword to destroy members of the public instead of a shield to protect them.

Finally, where a consignee complies with the tariff requirements and the shipper, which is a Governmental agency, does not through no fault of the consignee, it should be held that there is a sufficient compliance because the Government would certainly not be a party to discriminatory practices in connection with tariff requirements.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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